MOTION FILED
OCT 30 1978

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-703

ACKERMAN-CHILLINGWORTH, *et al.*,
*Petitioners,*

v.

PACIFIC ELECTRICAL CONTRACTORS ASSOCIATION, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## MOTION OF INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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October 1978

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## TABLE OF CONTENTS


| | Page |
|---|---|
| Motion for Leave to File Brief *Amicus Curiae* | 1 |
| Brief for *Amicus Curiae* | 5 |
| Interest of *Amicus* | 5 |
| Opinions Below | 5 |
| Jurisdiction | 6 |
| Statutory Provisions Involved | 6 |
| Question Presented | 6 |
| Statement of the Case | 7 |
| ARGUMENT: | |
| THE DECISION OF THE CIRCUIT COURT OF APPEALS SANCTIONS INTOLERABLE ANTI-COMPETITIVE PRACTICES WHICH HAVE GRAVE IMPLICATIONS FOR THE ENTIRE INSURANCE INDUSTRY THROUGHOUT THE UNITED STATES | 9 |
| Conclusion | 15 |

TABLE OF AUTHORITIES

*Statute:* Page

Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1976) .. 10

*Other Materials:*

A.M. BEST CO., BEST'S AGGREGATES AND AVERAGES, PROPERTY-CASUALTY, 1977 ..... 12, 13
LABOR RELATIONS EXPEDITER (BNA) ..... 13
INSURANCE INFORMATION INSTITUTE, INSURANCE FACTS, 1977 (Yearbook) ..... 13
U.S. BUREAU OF LABOR STATISTICS, DEPARTMENT OF LABOR, Bulletin No. 1937, DIRECTORY OF NATIONAL UNION AND EMPLOYEE ASSOCIATIONS, 1975 ..... 12
U.S. SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SOCIAL SECURITY BULLETIN, Vol. 41, No. 3 (March 1978), *Workers' Compensation: Coverage, Benefits and Costs, 1976* ..... 12

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## MOTION OF INDEPENDENT INSURANCE AGENTS OF AMERICA, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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The Independent Insurance Agents of America, Inc. (IIAA), is a nationwide, nonprofit organization. It represents over 33,000 independent property and casualty insurance agencies and approximately 135,000 indidivual agents. IIAA is dedicated to the preservation of a competitive insurance market in which insurance protection remains readily available from a variety of insurance underwriters through the services of capable insurance agents. IIAA believes that the public is best served by promoting competition through maintaining the opportunity for the consumer to select between insurance agents and among insurance underwriters, to the greatest extent possible.

The essential question presented in this case is whether the federal antrust laws tolerate an agreement among a labor union, a trade association and a trade association officer whereby all trade association members were required to purchase their workers' compensation insurance through the trade association officer, who also happened to be an insurance agent. As a result of the formation of this so-called "closed group", all other insurance agents who would have had the potential of selling workers' compensation insurance to the members of the trade association were boycotted and foreclosed.

The discussion of this issue by the courts below represents precedent that could be interpreted to foreclose insurance agents from competition for billions of dollars of insurance annually. As such, the issues presented by those decisions are a matter of great importance to the members of IIAA, and the insurance consumers generally.

The insurance industry is specialized and highly complex. In addition, insurance agents play a vital role in the efficient and competitive distribution of insurance products. As such, IIAA occupies a unique position to assist this Court in its understanding of the necessary facts essential to its decision: (1) the importance of this case to the countless consumers of insurance and to hundreds of thousands of insurance agents; and, (2) the precise reason why the combination here challenged is so inimical to the realization of the goals of our antitrust laws. IIAA thus believes that this brief will substantially assist this Court in the resolution of the questions raised in this case.



We have sought consent to the filing of this brief from petitioners and respondents. Petitioners have given consent. Some respondents have refused consent; others have not responded.

Respectfully submitted,

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## BRIEF OF *AMICUS*

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### INTEREST OF *AMICUS*

The interest of *amicus*, Independent Insurance Agents of America, Inc., a national association of independent casualty and property insurance agents, is set forth in the foregoing motion.

### OPINIONS BELOW

The opinion of the District Court for the District of Hawaii is reported at 405 F. Supp. 99 (D. Hawaii 1975). The opinion of the United States Court of Appeals for the Ninth Circuit, dated March 22, 1978, Docket No.

76-1264, is unreported. A copy of the latter decision is appended to petitioners' petition for certiorari.

## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 22, 1978. A timely petition for rehearing *en banc* was denied on July 31, 1978, and the petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2101(c) (1976).

## STATUTORY PROVISIONS INVOLVED

The Sherman Antitrust Act, 15 U.S.C. § 1 (1976), provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

## QUESTIONS PRESENTED

1. Whether a collective bargaining agreement between a trade association and a labor union mandating that all trade association members and non-member electrical contractors bound by that agreement must participate in a group workers' compensation insurance plan is a *per se* violation of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976), when combined with an agreement or understanding that all member and non-member electrical contractors must utilize the exclusive services of the trade association's executive secretary as their insurance agent or solicitor, thereby precluding the electrical contractors from doing business or continuing to do business with petitioners.

2. Whether respondents' conduct, if not illegal *per se* as a concerted refusal to deal, is nevertheless an unreasonable restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1.



3. Whether respondents' agreement to refuse to deal with petitioners and to compel others to do likewise can be saved by an allegedly benign motivation.

4. Whether respondents' alleged motivation, even if a relevant question, can properly be adjudicated on a motion for summary judgment, where controverted by competent evidence.

## STATEMENT OF THE CASE

The Pacific Electrical Contractors Association (PECA) negotiated collective bargaining agreements with the International Brotherhood of Electrical Workers, Local 1186 (IBEW). PECA does so on behalf of all Hawaii electrical contractors, even though only half of those contractors belong to PECA. Effective in February 1974, PECA and IBEW adopted a novel scheme whereby all collective bargaining signatory contractors were compelled to purchase their workers' compensation insurance through a single agent, Oda, who was the executive secretary of PECA. PECA decided that the dividends earned on policies sold by Oda would be collected by Oda and retained by PECA and applied as dues even with respect to electrical contractors who were not members of PECA. As a result, PECA non-members would effectively forfeit their dividends to PECA, whose financial situation was alleged to be precarious. In addition to providing PECA with insurance policy dividends of PECA members and non-members alike, the arrangement necessarily excluded from competition for electrical contractors' workers' compensation insurance every insurance agent other than Oda.

Plaintiffs, seven independent insurance agents and insurance solicitors affected by the boycott, filed suit in the district court of Hawaii, seeking injunctive and monetary relief for violations of Section 1 of the Sherman Act (15 U.S.C. § 1 (1976)) and Section 8(b)(4)

(ii) (A) and (B) and 8(e) of the National Labor Relations Act (29 U.S.C. §§ 158(b) (4) (ii) (A) and (B) and 158(e)) (1976)). Named as defendants were PECA, IBEW, Oda, Fujikawa (an officer of IBEW), and the insurance company (PEIC) (and its parent (INA)) which provided the insurance.[1]

The district court granted defendants' motion for summary judgment. Plaintiffs appealed the dismissal of their suit to the United States Court of Appeals for the Ninth Circuit. There a panel upheld the district court's decision by a 2-1 vote. The majority concluded that, even if the plan was "closed" (*i.e.*, that defendants agreed to make Oda the exclusive agent for all workers' compensation insurance purchased by any of the electrical contractors), such plan was lawful. Memorandum Opinion (Mem. Op.) at 17, n. 7. The majority held that no *per se* violation of the Sherman Antitrust Act could be established, since the contractors whose freedom of choice was limited could not themselves be boycott victims. Mem. Op. at 18,n. 7. The majority also concluded that the designation of Oda as the exclusive agent of record could not affect the application of the rule of reason, since the intent and overall effect of the defendants' scheme was, somehow, to increase competition in Hawaii's insurance market. Mem. Op. at 14, 18-19, n.8.

Judge Hufstedler dissented, observing that the arrangement closely resembled the "classic vertical boycott model." Mem. Op. Dissent (Dissent) at 12. A reasonable basis existed for inferring coercion, she said, requiring further factual explication on remand. Dissent at 18. Moreover, PECA acted not only as a trade association protecting the interests of its members, but also as an organization seeking to derive financial support from the business of non-members by planning to retain dividends

[1] The dismissal as to PEIC and INA is not addressed in the instant petition since they both objected to the designation of an exclusive agent.



earned by them as a consequence of this insurance business. Dissent at 15.

## ARGUMENT

### THE DECISION OF THE COURT OF APPEALS SANCTIONS INTOLERABLE ANTICOMPETITIVE PRACTICES WHICH HAVE GRAVE IMPLICATIONS FOR THE ENTIRE INSURANCE INDUSTRY THROUGHOUT THE UNITED STATES

The Court of Appeals assumed that the antitrust laws could tolerate the formation of a closed group, in which all electrical contractors could be required to purchase their insurance from the executive secretary of a trade association to which many of them did not belong. Unless this erroneous conclusion is reversed, it will not only cause irreparable injury to the several insurance agents and solicitors in this case, but also serve as an open invitation to other collective bargainers to create similar anticompetitive schemes. Extension of the practice approved by the Court of Appeals would threaten the livelihood of many thousands of insurance agents. It would also injure the many millions of consumers whose interests may be protected only by preserving the competitive market for insurance which has long existed. If the vital economic significance of this case is to be understood, it is necessary to comprehend the vast public benefits created by a competitive insurance marketplace, free of restrictive limitations such as were imposed by respondents.

With regard to independent insurance agents, the public is benefited by having the freedom to choose the agent best suiting the client's needs. Insurance agents generally provide a variety of services to their clients. One crucial function served by agents is to provide advice on coverages. This advice requires an appreciation of the changing nature of each business firm's operations,

the complexities of the various insurance options available, and the continuing need to evaluate past decisions. Insurance agents also provide advice on costs. Especially in commercial lines, well-trained agents may assist their clients in reducing their costs through loss prevention and engineering to reduce hazards. Too, independent agents provide assistance to clients at the time of losses by helping compile loss reports, obtaining repair estimates, and working with the insurance company and the insurance purchaser to reach a satisfactory settlement. Finally, each independent agent can serve his or her customers by coordinating each client's various insurance coverages.

Accordingly, individual variations among insurance agents, including their training and experience, constitute critical factors in the insured's decision about where to buy his insurance. Purchasers of insurance are thus benefited by the large number of insurance agencies, a number which reflects in part the small barriers to entry into the field. Consumers have historically enjoyed a large measure of freedom to select agents and insurance companies best suited to their needs. Such competition comports with the purposes of, and is protected by, the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1976).

The decision of the Court of Appeals failed to recognize the importance of maintaining, and the illegality of foreclosing, competition among insurance agents. What is objectionable here is that aspect of the plan whereby the electrical contractors (whether or not members of PECA) were required to place their insurance only through Oda, the executive secretary of PECA. IIAA believes that the closed group aspects of this arrangement closely parallel classic vertical boycott models, since PECA (through Oda) was, in effect, a competitor



of plaintiffs and arranged their exclusion from a market. *See* Dissent at 12. As Judge Hufstedler concludes, such a closed group would constitute a *per se* violation of the Sherman Antitrust Act because it compelled the non-member contractors to buy their workers' compensation policies from Oda's agency and denied access by plaintiff insurance agents to both the member and non-member contractors' market for workers' compensation policies. IIAA's point here is to emphasize that, even under the rule of reason, the scheme cannot stand. No justification has been offered for Oda to place all of the insurance needed by the electrical contractors. Whatever legitimate benefits might be achieved by selecting a single *carrier* for the workers' compensation of the entire group of electrical contractors could as well be obtained without restricting each contractor's freedom to choose the insurance *agent* who would best serve its specific needs. Obviously, no restraint of trade is reasonable where less restrictive measures permit the achievement of all legitimate purposes of those participating. PECA's desire to supplement its alleged faltering income by reaping the dividends earned by non-member contractors cannot excuse its agreement to restrain trade.

It is bad enough that the decisions in this case have permitted the foreclosure of insurance agents other than Oda from competition for workers' compensation insurance. Group boycotts and other restraints of trade should not be tolerated merely because the victims are often small businessmen. If not checked, these practices may extend themselves, with consequences which may be devastating to much larger segments of the economy. The Court of Appeals' decision, if permitted to stand, may encourage other bargainers with motives like respondents' to adopt equally restrictive schemes. For this reason, we now turn to an examination of the scope of the market which is

endangered by the anticompetitive conspiracy sanctioned by the Court of Appeals.

In 1974,[2] there were 194,726 separate collective bargaining agreements in effect, covering almost 23 million employees.[3] Many such agreements include provisions relating to workers' compensation. 69.1 million workers (88.5 percent of all employed wage and salary workers) are protected by workers' compensation laws.[4] The market for workers' compensation insurance is large, and growing. In 1976, 508 stock insurance companies wrote workers' compensation insurance.[5] In that year, such companies wrote workers' compensation insurance involving premiums of over $5.6 billion.[6] The rapid growth rate in this area is demonstrated by comparing this figure with that from the preceding year, $4.65 billion, which reveals that premiums increased by almost one *billion* dollars in just twelve months.[7] Mutual insurance companies also wrote a substantial dollar volume of premiums in workers' compensation insurance. In 1976, the figure was $1.8 billion, more than $325 million higher than the preceding year.[8] With so much money involved, it is apparent that workers' compensation insurance represents a significant portion of the insurance business in America.[9] That business is of obvious importance to independent insurance agents, whose livelihood generally depends on commissions generated through policy sales and renewals. The vast majority of independent insurance agencies survive on premium volumes of less than $500,000 per year.

Thus, what is at issue is the elimination from the competitive market of very large amounts of insurance. This would destroy the consumers' freedom of choice and the agents' freedom to compete. Other likely effects are the elimination of agents, who serve the public, and increased concentration. If the above figures alone were not enough to show the potential impact of the elimination of a system of free competition, even more chilling evidence is provided by figures considering other sorts of insurance likely to be addressed in the context of collective bargaining agreements. Group accident and health insurance plans for employees have long been an important issue in collective bargaining. Each of these agreements is potentially affected by the Court of Appeals' doctrine. In 1976, premiums written for accident and health insurance were $1.7 billion for stock insurance companies and $359 million for mutual insurance companies, of which a large proportion were for group insurance policies.[10] Collective bargaining agreements also address matters such as group life insurance (which is probably the single most common welfare benefit negotiated in collective bargaining agreements)[11] and group legal

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[2] Figures cited herein are the most recent available.

[3] U.S. BUREAU OF LABOR STATISTICS, DEPT. OF LABOR, Bulletin No. 1937, DIRECTORY OF NATIONAL UNION AND EMPLOYEE ASSOCIATIONS, 1975, at 75-78.

[4] U.S. SOCIAL SECURITY ADMIN., DEPT. OF HEW, SOCIAL SECURITY BULLETIN, Vol. 41, No. 3 (March 1978), at 30, *Workers' Compensation: Coverage, Benefits and Costs, 1976.*

[5] A.M. BEST CO., BEST'S AGGREGATES AND AVERAGES, PROPERTY-CASUALTY, 1977 [hereinafter cited "BEST'S at ——"], at 40.

[6] BEST'S at 142.

[7] *Id.*

[8] BEST'S at 40B.

[9] Total premiums written by insurance companies in 1976 approximated $130 billion. INSURANCE INFORMATION INSTITUTE, INSURANCE FACTS, 1977 (Yearbook), at 11.

[10] BEST'S at 39, 40B, and 61B.

[11] LABOR RELATIONS EXPEDITER (BNA) § 15, at 237.

services.[12] The amount of prepaid legal insurance premiums is dwarfed by the dollar volume of group life insurance, but these additional examples emphasize the broad scope of the potential disruption to the insurance business, if such practices as the Court of Appeals has condoned are permitted to spread. The same arguments that have been made to justify the terms of the Hawaii collective bargaining agreement could be employed in these other contexts with devastating consequences for America's independent insurance agents.

[12] Other kinds of insurance are also sometimes covered in collective bargaining agreements. Group auto insurance and group dental insurance are but two additional examples of items as to which competition could be destroyed, if the Court of Appeals' ruling stands.



## CONCLUSION

With these considerations in mind, the need for review of the appellate court's decision becomes clear. The scheme here challenged has obvious anticompetitive purposes and effects and portends a major disruption of historically competitive insurance markets. Summary judgment was a particularly inappropriate means to determine whether a closed group existed, and the district court's error was compounded when the Court of Appeals concluded that even a closed group arrangement could be tolerated under federal antitrust laws. This Court now must choose whether to encourage or arrest the wholesale restriction of insurance competition, recognizing that the case has ramifications extending far beyond the parties directly involved in this suit. The Independent Insurance Agents of America respectfully ask that this Court vacate the decision of the United States Court of Appeals for the Ninth Circuit and award the insurance agents their day in court.

Respectfully submitted,

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